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# Supreme Court of the United States

October Term, 1959.

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## No. 728

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**R. P. FARNSWORTH & CO., INC.**
**Petitioner**

**versus**

**TRI-STATE CONSTRUCTION COMPANY et al.**
**Respondents**

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## PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit, and in support of its petition respectfully shows:

## OPINION BELOW and JURISDICTION

The case was tried to a jury, which found adversely to petitioner.

The Court of Appeals for the Fifth Circuit rendered its opinion, Judge Cameron dissenting, on October 27, 1959.

affirming the judgments entered on the verdict. The opinion of the Court of Appeals is reported at 271 F2d 728, and is printed in the Appendix hereto.

The Court of Appeals refused a petition for a rehearing on December 1, 1959, Judge Cameron dissenting. Jurisdiction of this court lies under 28 USC 1254.

## QUESTION PRESENTED

May judgments of a federal district court entered on a jury verdict be affirmed on appeal despite the fact that the trial court:

a—Gave all charges requested by all of the parties, including charges which were erroneous and mutually irreconcilable on vital questions presented for determination by the jury;

b—Instructed the jury to construe and determine the legal effect of the contract documents;

c—Permitted counsel to argue his legal contentions to the jury; and

d—Interjected comments in the charges of the losing party which emphasized the contentions of the prevailing parties?

The ground for this petition is that the Court of Appeals has sanctioned such a departure by the district court from the accepted and usual course of judicial proceedings in the federal courts as to call for an exercise of this court's power of supervision.

In its FELA line of decisions, this court has made it clear that in federal jury trials the constitutional division of function between court and jury must be strictly respected.

That line of decisions is occupied chiefly with the problem of encroachment by the court on the jury's sphere of authority. But parties to a lawsuit are equally entitled to effective discharge by the court of its own proper role.

Another panel of the Fifth Circuit itself recently recognized that "'it is of the genius of our institutions that (jury trials) be conducted under the firm and steady guidance of judges as administrators, who, having minds trained and personalities adequate to the task, are held primarily responsible for their just outcome . . . His (the trial judge's) chief function, his primary object, is to keep the case within legal bounds by admonitions and rulings from its beginning to its end . . . (A) trial judge may never abdicate his function, or surrender to counsel the conduct of the trial.'" *Theriot vs. Mercer*, 262 F2d 754, 756 (1959), cert. den., 359 US 983.

The circumstances of this case appear to raise serious question, within the appropriate purview of this court's supervision, whether the Court of Appeals has not here approved what it there condemned—the abondonment by the trial judge to counsel of the task of instructing the jury, and the abandonment to the jury itself of the task of selecting applicable legal principles and construing written contracts, at the same time injecting his own in-

fluence in the trial to emphasize the contentions of one of the parties.

## STATEMENT OF THE CASE

Petitioner, a large New Orleans company, was general contractor for erection of a Capehart housing project[1] for the United States Government at Fort Stewart, Georgia. Petitioner contracted to erect seventy-four multiple-unit dwellings, employing conventional construction means, that is, construction on the site from raw materials, utilizing no prefabricated panels.

Thereafter, American Houses, Inc. interested petitioner in using its prefabricated panel units, and introduced Tri-State Construction Company as a local Georgia contractor experienced in installing American's prefabricated materials.[2]

The Corps of Engineers, representing the United States, was persuaded to accede to prefabrication type of construction. Petitioner, Tri-State and American then entered into integrated agreements in March 1957, consisting of a subcontract and an annexed purchase order.

The subcontract between petitioner and Tri-State provided in capital letters that no extras would be allowed

[1] Under 12 USC 1748 *et seq.*

[2] Tri-State was brought into the picture by American because petitioner insisted that it would consider installation of prefabricated units only if American would agree to "a contract which would provide the components (installed) in place" (R. 148, 447-45, 1178-79).

except on petitioner's written order[3] (Plaintiff's Exhibit 2, R 1461, R 116). It also provided that it "is awarded in conjunction with . . . a purchase order to American Houses, Inc. . . . a copy of which is attached hereto and made a part of this subcontract".

The purchase order from petitioner to American bound American "to provide materials . . . as outlined below, complete and in such quality and quantity to make these items of work whole and complete in every respect to the true intent and meaning of the plans and specifications". It also stated that petitioner "has entered into a subcontract with Tri-State . . . (copy of which contract is attached hereto)" (Plaintiff's Exhibit 2, R 1464, R 116).

In the purchase order, American, in event of Tri-State's default, further undertook to "provide and arrange for another subcontractor to complete the work, at no additional cost" to petitioner and subject only to approval of Tri-State's surety (Plaintiff's Exhibit 2, R 1464, R 116).

American confirmed the Tri-State subcontract, its own purchase order and their integration, by a letter to petitioner in which it agreed that the subcontract and purchase order "are complementary and intended to inte-

[3] The provision in question read as follows:

"4(a) Subcontractor shall make all alterations, furnish materials for and perform all extra work or omit any work Contractor may require without nullifying this agreement, at a reasonable addition to or deduction from the contract price hereinafter set forth and pro rata to the same. HOWEVER, NO ALTERATIONS OR CHANGES SHALL BE MADE EXCEPT UPON CONTRACTOR'S WRITTEN ORDER. The amount to be paid by Contractor or allowed by Subcontractor, as a result of such changes or alterations, shall be stated in such order."

grate in such a way as to produce a finished product of all the items shown on plans and specifications . . . and if any deficiency in materials necessary to complete the work in accordance with said plans and specifications shall arise, we will see to it that such deficiency will be supplied" (Defendant's Exhibit 22, R 1468, R 447).

American and Tri-State entered into a separate agreement, to which petitioner was not a party, covering the furnishing of materials by American, in which American warranted to Tri-State that the materials would be "acceptable as delivered for erection by organized labor" (Defendant's Exhibit 4, R 151).

Petitioner agreed to pay American $860,178 for the materials, and to pay Tri-State $191,466 for their erection.

Tri-State worked for several months under this arrangement, but defaulted on September 25, 1957, and finally abandoned the job completely on October 4. American failed to substitute another subcontractor, and petitioner had to finish erecting the units itself, incurring substantial extra costs.

Several months before the project was completed, Tri-State commenced this litigation by suing petitioner for an alleged balance for contract and extra work. Tri-State based its cause of action on the theory that its abandonment of the work was justified by American's failure to furnish proper materials and to pay certain sums which it owed Tri-State, as well as by petitioner's failure to pay Tri-State for alleged extra work (R 15-17, 1302, 1394).

Petitioner counter-claimed against Tri-State and its surety for damages caused by Tri-State's default. Petitioner also filed a third-party action against American and its surety because American had failed to comply with its agreement to furnish a substitute subcontractor after Tri-State's default, and because Tri-State's suit against petitioner was based in part on American's failure to make proper deliveries of materials to Tri-State.

American then counter-claimed against petitioner for unpaid materials (which petitioner claimed as setoffs against damages caused by Tri-State's default and American's failure to provide materials and a substitute subcontractor), and cross-claimed against Tri-State for indemnity for any sums which petitioner might recover from it.

Near the close of the trial each party submitted requests for instructions.[1] At the conclusion of the evidence the jury was withdrawn and the judge discussed with counsel the charge he would give. He read into the record the preliminary portion of the proposed charge and then said: "Now, I come to your requests on both sides, and I am going to follow them pretty well. I usually do" (R 1245).

The judge then read into the record all of the requested charges. While reading those requested by petitioner, the judge indicated orally that he was making certain in-

[1] Petitioner's Requests Nos. 1 through 22 and 1-A (R 1359-74); Tri-State's Requests Nos. 1 through 6 (R 1388-94); American's Requests Nos. 1 through 4 (R 1386-88); and Requests by American Surety Nos. 1 through 3 (R 1382-85).

sertions (R 1252, 1259, 1262). In concluding his remarks, the judge stated: "Everything that I have read today, I am going to charge tomorrow" (R 1272).

The case was then argued to the jury. Tri-State's counsel was permitted over objection (R 1277), to make extensive arguments concerning portions of the charge the court had stated would be given (R 1273-80), and was even allowed to cite and summarize decisions from an open book of Georgia Reports (R 1276-78) and to read an excerpt from American Jurisprudence (R 1279-80).

The next morning the judge read his entire charge to the jury, including all charges requested by each of the parties, with certain interjections in the charges requested by petitioner (R 1281).

Petitioner objected in detail to all charges given in behalf of Tri-State, and to certain charges given in behalf of its surety and American, on the ground that they were erroneous and that they contradicted the charges requested by petitioner.[5]

Petitioner objected also to the side remarks and interjections of the court which emasculated and detracted from petitioner's requested charges (R 1341-42).

The court "overruled each and every exception made by either side" and "let the charge stand as given to the jury" (R 1344).

[5] R 1334-44. Tri-State objected to petitioner's charges on the ground that they contradicted Tri-State's charges. R 1327-28.

The jury returned a verdict in favor of Tri-State against petitioner for $133,020.80 and in favor of American against petitioner for $151,142.35 (R 1346-47).

## ARGUMENT

### A

### Trial Court Errors

#### 1—Erroneous and Conflicting Charges

##### a

The federal appellate courts have repeatedly recognized the erroneous and prejudicial nature of contradictory charges.[6] In the words of the Eighth Circuit, when "instructions were conflicting" they were "therefore erroneous" (*Voss vs Becko*, 192 F2d 827, 830 (CA 8-1951)), because "it is the duty of the jury to accept as the applicable law that given by the court and no other".

[6] During argument on motions for a new trial the trial court finally recognized that the charges requested by opposing parties were contradictory and confusing, but erroneously took the position that he had not given all of the requested charges: "Mr. Kaskell: . . . I believe the court gave all the requests for charges made by all parties.

"The Court: Some I did not. There was such a confliet.

"I didn't give them all . . .

"I couldn't charge what your contention was so directly opposite of what the other side was, because the jury wouldn't have understood what I was trying to tell them.

"Mr. Kaskell: I believe the record will show that all of these charges were charged and there was contradiction—

"The Court—(Interposing) It would have been if I had charged all of them." (R 1412-13.)

*Glendenning Motorways vs Anderson*, 213 F2d 432, 435 (CA 8-1954).[7]

The Sixth Circuit has pointed out that "the difficulty created by inconsistent or contradictory instructions on a material point is, first, that it is impossible for the jury to know which is to be their guide; and secondly, it is impossible after verdict to ascertain which instruction the jury followed". *Standard Life & Accident Ins. Co. vs Sale*, 121 Fed. 664, 669 (1903).

In the case at bar the Court of Appeals acknowledged that the trial court "gave all of the charges requested by the parties and that resulted in some conflict, a practice certainly not to be approved" (271 F2d at 737; Appendix at page 38). That court excused this error, however, on the ground that petitioner's charges were erroneous and those of Tri-State and American proper, so that petitioner could not complain.

References to the charges on two crucial issues demonstrate the error of this view. It will be recalled that the whole theory of Tri-State's case was that it was justified in abandoning work under its contract with petitioner, and was entitled to damages from petitioner, because (1) American failed to deliver proper materials and American failed to pay moneys it owed to Tri-State, and (2) petitioner failed to pay Tri-State for extra work.

[7] Accord: *Zumwalt vs Gardner*, 160 F2d 298 (CA 8-1947); *Midcastern Contracting Corp. vs O'Toole*, 55 F2d 909 (CA 2-1932); *J. H. Sullivan Co. vs Wingerath*, 203 Fed. 460 (CA 2-1913).

b

In connection with the first ground, the trial court, at Tri-State's request, instructed the jury that "in the event you should find that Tri-State has incurred additional expense for labor or materials as the *sole and direct result* of the *failure of American Houses to furnish materials* . . . Tri-State would be entitled to recover any such expense from the defendant Farnsworth (petitioner) . . ." (R 1302).

The trial court next instructed the jury that "in the event you should find that Farnsworth or *American Houses* has *failed to perform work or to furnish materials* which they were obligated to furnish or perform . . . and . . . such failure or default . . . caused or materially contributed to the failure or inability of Tri-State Construction Company to complete the performance of its subcontract . . . then and in such event neither Farnsworth nor American Houses would be entitled to recover from . . . Tri-State" (R 1319).

The trial court went on to instruct the jury that "in the event you find that Farnsworth or *American Houses was indebted to Tri-State* Construction Company for work done on said job and wrongfully refused to pay Tri-State for such work and thereby caused or contributed to the inability of Tri-State to complete performance of said contract . . . then and in that event neither Farnsworth nor American Houses would be entitled to recover from . . . Tri-State" (R 1320).

These three charges completely contradicted those given at the request of petitioner,[9] and made petitioner the guarantor of American's contract and monetary obligations to Tri-State. The first charge actually authorized imposition on petitioner of Tri-State's damages from American's failure to furnish proper materials. The last two charges denied petitioner any recovery from Tri-State if American failed to furnish proper material or was indebted to Tri-State.

These charges find no support in the contract documents or elsewhere in the record.

In their opinion, the majority of the Court of Appeals discuss these three charges, but make no attempt to justify their imposition of this indemnity obligation on petitioner. The majority sustains the charges on the sole basis that "Tri-State did not guarantee, nor become responsible for, American's performance" (271 F2d at 726; Appendix at page 34), which is no justification at all for charges holding that petitioner guaranteed American's performance and indebtedness to Tri-State.

c

The second basic element of Tri-State's claim was petitioner's failure to pay for alleged extra work.

As stated, the agreement between petitioner and Tri-State expressly specified that no payment for extra

[9] These charges were in no manner related to the asserted supplemental agreement for extras.

[10] Appendix pages 40-42. See also petitioner's other requested charges (R 1359-71).

work would be made except on petitioner's prior written change order. At petitioner's request, the trial court correctly charged the jury that this provision could be waived, but that it was necessary to establish any such waiver "by the preponderance of the evidence, so that the burden is on Tri-State to show that Farnsworth waived such provision" (R 1360, 1307). See *Lord Constr. Co. vs United States*, 28 F2d 340 (CA 3-1928); *United States vs Henke Constr. Co.*, 157 F2d 13 (CA 8-1946).

The trial court destroyed entirely the effect of this charge by giving Tri-State's requested instruction that "if you find that Tri-State Construction Company has performed services in the form of labor and materials in behalf of and at the instance of the defendant Farnsworth and that these services were received and accepted and were of a benefit to the defendant Farnsworth . . . then and in that event, you gentlemen shall determine the reasonable value of the labor and materials furnished, and return a verdict in favor of Tri-State" (R 1300-1301).

This latter charge completely dispensed with Tri-State's burden of proving a waiver of the requirement of written change orders.

The Court of Appeals approved the charge on the basis of a Georgia statute and two Georgia decisions, which relate to typical *quantum meruit* situations and have no bearing on a transaction involving a contract which expressly makes written change orders prereq-

uisite to payments for extra work (271 F2d at 737; Appendix at page 37).

d

It is abundantly clear that the trial court delivered charges which were erroneous, and which conflicted with correct charges requested by petitioner, on each of the two essential grounds for the verdicts against petitioner.

Instead of assuming its role as selector of the legal principles to be applied in the case, the trial court shifted this task to the jury by giving all charges requested by all parties, thus leaving the jury in a welter of conflicting rules, and rendering it impossible to determine how the jury resolved the factual issues presented.

The court's mismanagement of the instructions to the jury brought about prejudice and confusion[10] that do not exist in a fair trial.

**2—Contract Interpretation by Jury**

It is the obligation of the court to instruct the jury as to the legal effect of written instruments.[11]

[10] During the trial one of the jurors had said: "We are confused enough as it is. We have had a full treatment of it, Judge, I guarantee you that" (R 919).

[11] *City of Orlando vs Murphy*, 84 F2d 531 (CA 5-1936); *O'Brien vs Elder*, 250 F2d 275, 278 (CA 5-1958); *Knight vs Causby*, 23 SE2d 458 (Ga. App.-1942); *Loftis Plumbing & Heating Co. vs American Surety Co.* 40 SE2d 667 (Ga. App.-1946); *Ben-*

The trial court in this case, however, charged the jury that "the court has not attempted to outline the contents of these contracts to you, but you are instructed to refer to them directly in order to determine for yourselves their contents and the duties and obligations imposed upon the respective parties" (R 1298).

The contract documents were at the very bottom of the disputes among the parties, and the parties were in sharp disagreement as to the proper meaning of the documents, as evidenced by the requested conflicting charges.

The trial court would have been justified in submitting the contracts to the jury for the purpose of determining the meaning of the words "pilot house" and "shop drawings". There was, however, no limiting language in this charge (R 1298) and the contracts were not given to the jury merely to determine the meaning of any such technical words.

The Court of Appeals conceded that "the construction of the written contracts was, of course, for the court", but the Court of Appeals condoned the charge on the ground that the contracts were submitted to the jury "in order for the jury to see their contents" (271 F2d at 733; Appendix at page 28).

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*nett vs Dove*, 90 SE2d 601 (Ga. App.-1955). "The court cannot devolve its duty of construing written instruments upon the jury merely because its performance involved possible difficulty." *General Motors Corporation vs Abell*, 292 Fed. 922, 926 (CA 1-1923). Accord: *Drainage Dist. No. 1, vs Rude*, 21 F2d 257, 262 (CA 8-1927).

There could be no reason for the jury to examine the contents of the contracts unless they were to draw conclusions therefrom, including "the duties and obligations imposed on the respective parties" (R 1298), as the erroneous charge in question expressly instructed them to do.

### 3—Legal Argument to Jury

Not content with serving as a mere conduit of instructions from counsel to jury, the trial court compounded the resultant confusion by permitting counsel for Tri-State, over petitioner's objection (R 1277), to argue to the jury the legal merits and demerits of the charges. Counsel was further permitted to give verisimilitude to his argument by reading to the jury from two lawbooks (R 1274-78).

This court has held that "it is the province of the court to instruct the jury as to the principles of law affecting the case, and counsel cannot appeal to a jury to decide legal questions by reading cases to them". *Roberts vs Cooper*, 61 US 467, 481 (1857). See *Glendenning Motorways vs Anderson*, 213 F2d 432 (CA 8-1954).

The Court of Appeals brushed aside this error without discussion (271 F2d at 738; Appendix at page 38).

## 4—Prejudicial Comments

a

The trial judge did not in any way vary the charges requested by Tri-State, American or their sureties (R 1298-1302, 1317-21, 1382-94). But seven times during the reading of petitioner's requested charges the judge interjected the contentions of the opposing parties.[12]

One or two of the interjections were not even pertinent to the charges to which the additions were made, but served merely to emphasize an important Tri-State contention.[13] In one of petitioner's charges the judge interjected Tri-State's theory three times.[14] The judge also indicated his approval of the legal contentions stated in Tri-State's closing argument to the jury (R 1275-76, 1279).

All of this was clear infringement of the rule that in charging the jury the trial court should "avoid undue emphasis of issues, theories or defenses by repeti-

[12] See Appendix at pages 43-44.

[13] For example, petitioner's Request No. 9 stated that under the provisions of the subcontract (Sec. 3(d), R 1461), if petitioner delayed Tri-State's work, Tri-State would not be entitled to damages for the delay but to an extension of time equal to the delay (R 1311). The court added: "Tri-State, of course, contends that it . . . was forced to leave the job by Farnsworth . . ." (R 1311). Petitioner's Request No. 6 stated that petitioner was entitled to get everything set forth in the contract and that nothing to be done under the contract itself could be considered an extra (R 1362-63). The court added: "I think I charged you in different words as to that, as to the parol agreement and the written agreement. I think I charged you specifically as to that" (R 1310).

[14] See Appendix at page 44, paragraph 6.

tion or by giving them undue prominence or by minimizing the importance of others".[15]

The Court of Appeals found, without discussion, that no error had been committed (271 F2d at 738; Appendix at page 38).

**B**

**The Writ Should Issue**

This court, like another panel of the Fifth Circuit whose opinion is quoted under *Question Presented* above, has held that "in a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides". *Herron vs Southern Pacific Co.*, 283 US 91, 95 (1931).

Mr. Justice Harlan has noted that "it has always been the function of the court to see to it that jury verdicts stay within that boundary, that they be arrived at by reason and not by will or sheer speculation". *Rogers vs Missouri Pacific Railway Co.*, 352 US 500, 564 (1957), concurring opinion.

[15] *White Auto Stores vs Reyes*, 223 F2d 298, 305 (CA 10-1955); *Howard vs Cincinnati Sheet Metal and Roofing Co.*, 234 F2d 233 (CA 7-1956).

Mr. Justice Frankfurter has stated that "trial by jury as guaranteed by the Constitution of the United States and by the several States pre-supposes a jury under proper guidance of a disinterested and competent trial judge". *Wilkinson vs McCarthy*, 336 US 53, 64 (1949), concurring opinion.

This case presents the reverse side of the coin whose obverse has been burnished by this court's repeated examination of cases in which the jury was not permitted to pass on fact questions.

Here, not dominating the jury or usurping its functions, the judge so far forgot his own authority as to abdicate completely to counsel the task of instructing the jury on the law, and to the jury the task of choosing among the contradictory legal principles presented to it, and of construing the legal effect of the contract documents. The judge's passivity in the role in which he should have asserted himself, further served to emphasize the prejudicial effect of his improper interjections in the charges requested by petitioner.

It is respectfully submitted that the record in this case presents a substantial distortion, to petitioner's prejudice, of the balance between court and jury which the Constitution commands; and that the condonation of this unfair trial by the Court of Appeals provides an appropriate question whether, in the exercise of this court's "supervisory powers over the lower federal courts, the judgment of the Court of Appeals should be

reversed in the interest of justice". *Gibson vs Lockheed Aircraft Co.*, 350 US 356, 357 (1956).

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